

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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In re Application of:  
Bruce Kneller

Application No.: 10/785,600

Confirmation No.: 3185

Filed: February 23, 2004

Art Unit: 1617

For: MODIFIED DELTA5-ANDROSTENES  
HAVING IMPROVED BIOAVAILABILITY

Examiner: B. Badio

**PETITION TO REVIVE APPLICATION**

MS Petitions  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Applicant respectfully petitions to revive the subject application under 37 C.F.R. §1.137(a) because the delay in replying to the Office Action mailed from the U.S. Patent & Trademark Office (PTO) on May 3, 2007 was unavoidable by Applicant. In support of this Petition Applicant submits herewith:

- (1) The required reply to the outstanding Office Action;
- (2) The petition fee as set forth in 37 C.F.R. §1.17(l); and
- (3) A Statement of Facts by Bruce Kneller (unexecuted).

No terminal disclaimer under 37 C.F.R. §1.137(d) is required in the subject application. Applicant states that the entire delay in filing the concurrently submitted reply from the due date until the filing of this grantable petition was unavoidable by Applicant.

The Statement of Facts by Bruce Kneller sets forth in detail the circumstances surrounding the apparent failure to timely file a Reply to the Office Action mailed from the PTO on May 3, 2007. Applicant cannot independently verify whether a timely reply was in fact filed with the PTO because his prior attorney has been non-responsive and has withheld the relevant

files as detailed in the Statement.

Applicant respectfully submits that the facts establish that the subject application was unintentionally and unavoidably abandoned for apparent failure to timely file a reply to the outstanding Office Action. Moreover, Applicant respectfully submits that the entire delay from the due date for reply to the filing of this Petition was unavoidable by Applicant.

As summarized by the MPEP (§711.03(c)), the courts have adopted a “reasonably prudent person” standard in determining if a delay was unavoidable. Specifically:

The word “unavoidable”...is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present. MPEP §711.03(c)

Applicant respectfully submits that he was diligent and careful in his original selection of Mr. Leavitt as his patent counsel, selecting a registered patent attorney personally known to him. In addition, during the years preceding Applicant’s incarceration, Mr. Leavitt had represented Applicant in his patent matters without apparent incident. Accordingly, it was unforeseen that Mr. Leavitt would forsake his duty of care to Applicant and fail to act on Applicant’s behalf in direct contradiction of Applicant’s instructions, particularly given that Mr. Leavitt had knowledge of Applicant’s incarceration and increased reliance on Mr. Leavitt’s representation. Clearly the abandonment of the subject application as a result of the apparent failure to timely file a reply to the outstanding Office Action was unavoidable by Applicant.

Moreover, Applicant did not learn of the abandonment of the subject application until advised by his new counsel (Ms. Treannie), as Mr. Leavitt did not advise Applicant that a reply had not been timely filed or forward the Notice of Abandonment to Applicant upon receipt from the PTO. Applicant notes that the record obtained from PAIR indicates that Mr. Leavitt also did not respond to inquiries from Examiner Badio regarding the status of the subject application.

Finally, as detailed in the Statement of Facts, Applicant took immediate action upon learning that the subject application had apparently been abandoned. Applicant's new counsel immediately attempted to obtain the file for the subject application from Mr. Leavitt, and, failing that, diligently prepared the concurrently submitted reply based on publicly available documents and consultation with Applicant. Under the circumstances of Applicant's incarceration and corresponding reduced availability for consultation, this process proceeded as quickly as possible. Accordingly, Applicant respectfully submits that the entire delay from the due date for reply to the filing of this Petition was unavoidable by Applicant.

The undersigned notes that the Statement of Facts has been reviewed and approved by Mr. Kneller; however, due to the limitations created by Mr. Kneller's incarceration an executed version has not yet been received by the undersigned. In the interest of submitting the documents supporting this Petition as soon as possible, the undersigned has submitted herewith an unexecuted copy of the Statement. An executed version will be forwarded immediately upon receipt.

Applicant believes that all requirements for a grantable petition under 37 C.F.R. §1.137(a) have been met, and Applicant respectfully urges the Commissioner to grant this Petition without delay. Applicant believes that all fees required for this submission have been properly accounted for, but Applicant hereby authorizes the Commissioner to charge any additional fees which may be due or credit any overpayment to Deposit Account No. 50-3655 under Attorney Docket BKNL-001-101.

Dated: 4/24/08

Respectfully submitted,

By Lisa M. Treannie

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